



**6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2015-0783; FRL-9940-79-Region 6]**

# **Approval and Promulgation of Implementation Plans; Arkansas; New Mexico; Oklahoma; Disapproval of Greenhouse Gas Biomass Deferral, Step 2 and Minor Source Permitting Requirements**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to disapprove severable portions of the February 6, 2012 Oklahoma State Implementation Plan (SIP) submittal that are now inconsistent with federal laws due to intervening decisions by the United States Courts and EPA rulemaking. This submittal establishes Minor New Source Review permitting requirements for greenhouse gas (GHG) emissions and includes Prevention of Significant Deterioration (PSD) permitting provisions for sources that are classified as major, and, thus, required to obtain a PSD permit, based solely on their potential GHG emissions. The PSD permitting provisions also require a PSD permit for modifications of otherwise major sources because they increased only GHG above applicable levels. Additionally, we are proposing to disapprove severable portions of SIP submittals for the States of Arkansas, New Mexico, and Oklahoma addressing the EPA's July 20, 2011 rule deferring PSD requirements for carbon dioxide (CO<sub>2</sub>) emissions from bioenergy and other biogenic sources ("Biomass Deferral"). We are proposing to disapprove the provisions adopting the Biomass Deferral because the deferral has expired, so the provisions are

no longer consistent with federal laws. The EPA is proposing this disapproval under section 110 and part C of the Act.

**DATES:** Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2015-0783, at <http://www.regulations.gov> or via email to [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Ms. Adina Wiley, (214) 665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**Docket:** The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Ms. Adina Wiley, (214) 665-2115, wiley.adina@epa.gov. To inspect the hard copy materials, please schedule an appointment with Ms. Adina Wiley or Mr. Bill Deese at 214-665-7253.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

## **I. Background**

### *A. The February 6, 2012 Oklahoma SIP Submittal*

On February 6, 2012, Oklahoma submitted revisions to the Oklahoma permitting programs for approval by the EPA into the Oklahoma SIP, including new Minor New Source Review (NSR) permitting requirements for GHG emissions at OAC 252:100-7-2.1 and revisions to the Oklahoma PSD program at OAC 252:100-8-31 (the definition of “subject to regulation”) to require PSD permits for sources solely because of GHG emissions. In addition, the submittal included many other updates to the Oklahoma SIP, unrelated to GHG permitting, which the EPA is addressing in separate actions. However, today’s action only addresses the provisions for GHG permitting that are inconsistent with federal laws.

### *B. The November 6, 2012 Arkansas SIP Submittal*

On November 6, 2012, Arkansas submitted revisions to the Arkansas Pollution Control and Ecology Commission’s Regulations, Chapters 2, 4 and 9 for approval by the EPA into the Arkansas SIP. The EPA finalized our approval of the submitted revisions to the Arkansas PSD program at Regulation 19, Chapter 9 that provide the State of Arkansas with the authority to issue PSD permits governing GHG emissions on April 2, 2013, at 63 FR 19596. The EPA finalized approval of the other parts of the submittal on March 4, 2015, with the exception of the severable components of the submittal at Regulation 19, Chapter 4 specific to the Arkansas

Minor NSR program, and the severable portion of the definition of “CO<sub>2</sub> Equivalent Emissions” implementing the Biomass Deferral at Regulation 19, Chapter 2. Today’s action only addresses the severable portion of the definition of “CO<sub>2</sub> Equivalent Emissions” at Regulation 19, Chapter 2 submitted on November 6, 2012. The EPA will address the revisions to the Arkansas Minor NSR program at Regulation 19, Chapter 4 in a separate action, at a later date.

*C. The January 8, 2013 New Mexico SIP Submittal*

On January 8, 2013, New Mexico submitted regulations specific to the New Mexico PSD permitting program for approval by the EPA into the New Mexico SIP. The EPA finalized approval of a portion of this submittal pertaining to plantwide applicability limits for GHGs on December 11, 2013, at 78 FR 75253. The submittal also included revisions to the PSD permitting provisions that were adopted on January 7, 2013, at 20.2.74 NMAC to defer the application of the PSD requirements to CO<sub>2</sub> emissions from bioenergy and other biogenic stationary sources consistent with the Biomass Deferral. The revisions to 20.2.74 NMAC to adopt the Biomass Deferral that are the subject of today’s rulemaking are the only portions of the submittal remaining before the EPA for review and approval.

*D. The January 18, 2013 Oklahoma SIP Submittal*

On January 18, 2013, Oklahoma submitted revisions to the Oklahoma regulations for approval by the EPA into the Oklahoma SIP that included provisions in the general definitions at OAC 252:100-1-3 and OAC 252:100-8-31 to defer the application of the PSD requirements to biogenic CO<sub>2</sub> emissions from bioenergy and other biogenic stationary sources that are the subject of today’s rulemaking. The submittal also included many other updates to the Oklahoma SIP which the EPA is addressing in separate actions.

## **II. The EPA’s Evaluation**

A. *Oklahoma SIP submission addressing permitting of GHG emissions in Oklahoma*

On February 6, 2012, the Oklahoma Department of Environmental Quality submitted a revision to the Oklahoma SIP that included, among other things, provisions to regulate the emissions of GHGs in construction permitting programs. The revisions to the Oklahoma Minor Source Permitting Program at OAC 252:100-7-2.1 establish a mechanism for sources in Oklahoma to take enforceable emissions limitations on GHGs to avoid becoming a major source for GHG emissions under the Oklahoma PSD program. The revisions to the Oklahoma PSD program at OAC 252:100-8-31 adopted a new definition of “subject to regulation” to identify when emissions of GHGs would be regulated under the PSD program. The revisions to the Oklahoma PSD program submitted were consistent with the EPA’s June 3, 2010, final rule “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (75 FR 31514) (hereafter referred to as the “Tailoring Rule”).

The Tailoring Rule phased in permitting requirements for GHG emissions from stationary sources under the CAA PSD and title V permitting programs. In Step 1 of the Tailoring Rule, which began on January 2, 2011, the EPA limited application of PSD and title V requirements to sources of GHG emissions only if they were subject to PSD or title V “‘anyway’” due to their emissions of pollutants other than GHGs. These sources are referred to as “‘anyway sources.’” In Step 2 of the Tailoring Rule, which began on July 1, 2011, the PSD and title V permitting requirements under the CAA applied to some sources that were classified as major, and, thus, required to obtain a permit, based solely on their GHG emissions or potential to emit GHGs, and to modifications of otherwise major sources that required a PSD permit because they increased only GHG emissions above the level in the EPA regulations. We generally describe the sources covered by PSD during Step 2 of the Tailoring Rule as “Step 2 sources.”

On June 23, 2014, the U.S. Supreme Court issued a decision in *Utility Air Regulatory Group (UARG) v. EPA*, 134 S. Ct. 2427, addressing the application of PSD and title V permitting requirements to GHG emissions. The U.S. Supreme Court held that the EPA may not treat GHGs as an air pollutant for the specific purpose of determining whether a source is a major source (or a modification thereof) and thus required to obtain a PSD or title V permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). With respect to PSD, the ruling effectively upheld PSD permitting requirements for GHG emissions under Step 1 of the Tailoring Rule for “anyway sources,” and invalidated PSD permitting requirements for Step 2 sources.

In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) issued an Amended Judgment vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of that rule. With respect to Step 2 sources, the D.C. Circuit’s amended judgment ordered that the EPA regulations under review (including 40 CFR 51.166(b)(48)(v) and 40 CFR 52.21(b)(49)(v)) be vacated “to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification.”

The EPA promulgated a final rule on August 19, 2015, removing the PSD permitting provisions for Step 2 sources from the federal regulations that the D.C. Circuit specifically identified as vacated (40 CFR 51.166(b)(48)(v) and 52.21(b)(49)(v)). Consistent with our August 19, 2015 final rule, the EPA is proposing to disapprove the submitted revisions at OAC 252:100-

7-2.1 and OAC 252:100-8-31 that pertain to the minor source permitting of GHGs and the PSD permitting of Step 2 sources.

*B. SIP submissions addressing the GHG Biomass Deferral in Arkansas, New Mexico and Oklahoma*

On July 20, 2011, the EPA finalized a rulemaking entitled “Deferral for CO<sub>2</sub> Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs”. (76 FR 43490) (“Biomass Deferral”). This rule deferred (for three years) the applicability of PSD and title V requirements CO<sub>2</sub> emissions from biogenic sources.<sup>1</sup> On July 12, 2013, the D.C. Circuit, in *Center for Biological Diversity v. EPA*, 722 F.3d 401, vacated the provisions of the Biomass Deferral. Due to a series of extension requests and rehearing proceedings, the court did not issue its mandate making the vacatur effective until August 10, 2015. However, the Biomass Deferral expired by its own terms on July 21, 2014. For both reasons, the Biomass Deferral is no longer applicable under federal laws.

Our analysis, available in our Technical Support Document in the rulemaking docket, finds that the States of Arkansas, New Mexico and Oklahoma each adopted and submitted as revisions to their respective SIPs, provisions that were substantively consistent with the requirements of the EPA’s now-expired Biomass Deferral. However, because the deferral expired on July 21, 2014, and the court issued its mandate, these provisions are no longer available for use under federal PSD regulations and should not be approved into a state’s PSD SIP. For that reason, we are proposing to disapprove these provisions.

---

<sup>1</sup> Emissions of CO<sub>2</sub> from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon (*e.g.*, calcium carbonate) and biologically-based material (nonfossilized and biodegradable organic material originating from plants, animals or micro-organisms [including products, by-products, residues and waste from agriculture, forestry and related industries as well as the nonfossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material])).

*C. Evaluation of the Submitted Revisions under Section 110 of the CAA*

The EPA has an obligation under section 110 of the CAA to act on submitted SIP revisions unless these revisions are withdrawn by the State. Because these provisions have not yet been withdrawn from our consideration, the EPA has a duty to act on the submitted provisions pertaining to the PSD permitting of Step 2 sources in the Oklahoma SIP and the provisions incorporating the now-expired Biomass Deferral into the Arkansas, New Mexico and Oklahoma SIPs. Our proposed action today will disapprove these provisions because the provisions are no longer valid under federal law or consistent with federal regulations; as such, our action today will not undermine the respective SIPs, PSD programs, or any other requirement of the CAA.

**III. Proposed Action**

We are proposing to disapprove severable portions of the February 6, 2012 Oklahoma SIP submittal establishing GHG permitting requirements for minor sources and Step 2 PSD sources. The EPA has made the preliminary determination that these revisions to the Oklahoma SIP should be disapproved because they establish permitting requirements that are inconsistent with federal laws. Therefore, under section 110 and part C of the Act, and for the reasons presented above, the EPA is proposing to disapprove the following revisions:

- Substantive revisions to the Oklahoma SIP establishing Minor NSR GHG permitting requirements at OAC 252:100-7-2.1 as submitted on February 6, 2012; and
- Substantive revisions to the Oklahoma PSD program in OAC 252:100-8-31 establishing PSD permitting requirements for Step 2 sources at paragraph (E) of the definition of “subject to regulation” as submitted on February 6, 2012.



We are also proposing to disapprove severable portions of the November 6, 2012 Arkansas SIP submittal, the January 8, 2013 New Mexico SIP, and the January 18, 2013 Oklahoma SIP submittal that include the Biomass Deferral in the Arkansas, New Mexico, and Oklahoma PSD programs. The EPA has made the preliminary determination that these revisions to the Arkansas, New Mexico, and Oklahoma SIPs should be disapproved because the Biomass Deferral has expired and adoption or implementation of these provisions is no longer consistent with federal regulations for PSD permitting. Therefore, under section 110 and part C of the Act, and for the reasons presented above, the EPA is proposing to disapprove the following revisions:

- Substantive revisions to the Arkansas SIP definition of “CO<sub>2</sub> Equivalent Emissions” at Regulation 19, Chapter 2 to implement the Biomass Deferral as submitted on November 6, 2012; and
- Substantive revisions to the New Mexico SIP definition of “Subject to Regulation” at 20.2.74.7 (AZ)(2)(a) NMAC to implement the Biomass Deferral as submitted on January 8, 2013.
- Substantive revisions to the Oklahoma SIP definitions of “carbon dioxide equivalent emissions” at OAC 252:100-1-3 and “subject to regulation” at OAC 252:100-8-31 as submitted on January 18, 2013.

The EPA is proposing to disapprove the revisions listed because the submitted provisions are no longer consistent with federal laws. There will be no sanctions or punitive measures taken as a result of our finalization of this proposed disapproval.

#### **IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR

52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to disapprove state law as not meeting Federal requirements for the regulation and permitting of GHG emissions.

A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. *Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA. There is no burden imposed under the PRA because this action proposes to disapprove submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions.

C. *Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action proposes to disapprove submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions, and therefore will have no impact on small entities.

D. *Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. This action

proposes to disapprove submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions, and therefore will have no impact on small governments.

E. *Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175. This action proposes to disapprove provisions of state law that are no longer consistent with federal laws for the regulation and permitting of GHG emissions; there are no requirements or responsibilities added or removed from Indian Tribal Governments. Thus, Executive Order 13175 does not apply to this action.

G. *Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it disapproves state permitting provisions that are inconsistent with federal laws for the regulation and permitting of GHG emissions.

H. *Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. *National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

J. *Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action is not subject to Executive Order 12898 because it disapproves state permitting provisions that are inconsistent with federal laws for the regulation and permitting of GHG emissions.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: December 17, 2015.

**Ron Curry,**  
*Regional Administrator, Region 6.*

[FR Doc. 2015-33098 Filed: 1/8/2016 8:45 am; Publication Date: 1/11/2016]